No. 80-957

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

ODOM CONSTRUCTION COMPANY, INC. AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a worker injured while relocating barge mooring blocks along the bank of a ship canal was "engaged in maritime employment" within the meaning of Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act.

TABLE OF AUTHORITIES

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OPINIONS BELOW

The opinion of the court of appeals is reported at 622 F. 2d 110. The opinion of the Benefits Review Board is reported at 7 B.R.B.S. 467. The decision and order of the administrative law judge are not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1980. The petition for a writ of certiorari was filed as of October 20, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Domtar Salt Mine Company is located on Miller's Island, near Franklin, Louisiana. The island is bounded on one side by the Gulf of Mexico and on the other by the Intracoastal Canal, which is part of the Intracoastal Waterway System (Pet. App. A-9). A navigable canal approximately 500 feet long extends from Domtar's loading docks to the Intracoastal Canal. Some time before July 1973, Domtar installed four large concrete blocks along the banks of the canal. The blocks were used as moorings for barges that were waiting to be moved to the Domtar loading facilities or that had already been loaded at Domtar and were waiting for towboats to take them to the Intracoastal Canal (Pet. App. A-9 to A-10, A-23, A-36).

By July 1973, the 20-ton concrete blocks had slipped into the canal due to erosion of the land alongside the waterway. Domtar retained petitioner Odom Construction Company to raise the blocks out of the canal and move them onto higher ground on the bank. Respondent Garfield Maze, Jr. was one of the Odom employees assigned to this task. He was injured in the course of his employment on July 9, 1973, and was permanently totally disabled (Pet. App. A-13 to A-17, A-28 to A-29, A-42 to A-45).

On the day of his injury, respondent Maze began his duties by working in the water of the Domtar canal. He dug around and under the concrete blocks so that wire rope could be passed around them and used to haul the blocks to higher ground (Pet. App. A-36). At the time of his injury, Maze was standing on land adjacent to the canal. He was using an oxyacetylene torch to cut wire rope that was fastened to the concrete blocks and was to be used as a hoist. The torch exploded, burning Maze severely (Pet. App. A-8 to A-9, A-17, A-23, A-36).

2. Respondent Maze filed a claim for benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* An administrative law judge found that Maze was a covered "employee" within the meaning of Section 2(3) of the Act, 33 U.S.C. 902(3) (Pet. App. A-12). The Benefits Review Board sustained the administrative law judge's decision (Pet. App. A-24 to A-26). Relying on *Texports Stevedore Co.* v. *Winchester*, 554 F. 2d 245 (5th Cir. 1977, aff'd en banc, 632 F. 2d 504 (1980), the Board explained its ruling that Maze was a covered employee (Pet. App. A-26):

> * * * [T]he work he performed was maritime employment. He was repairing and maintaining a temporary docking area in a ship loading facility. This waiting area requires periodic maintenance * * *. The temporary docking arrangement was essential and functionally related to the safe, orderly barge loading process at Domtar's Salt Mine.

Petitioners, Odom and its liability insurance carrier, sought judicial review under 33 U.S.C. 921(c). The court of appeals affirmed (Pet. App. A-35 to A-45), holding that the act of moving the concrete mooring blocks was "maritime work." The court suggested that "the repair of moorings,

even of those not adjacent to main docks, [might be] a type of job that could be performed by a typical harborworker" (Pet. App. A-36 to A-37). The court concluded, however, that, even if respondent Maze was not a "harborworker" within the meaning of Section 2(3) at the time of his injury, he was nevertheless a covered employee under the statute, because his work "directly furthered maritime commerce" and therefore deserved the label "maritime employment" (*id.* at A-37). The court of appeals rejected the argument that respondent Maze could not be a covered employee because he "spent the great majority of his time doing indisputably land-based jobs" (*id.* at A-38). Relying on this Court's decision in *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69 (1979), the court of appeals recognized that acceptance of petitioners' position in this regard "would create a major opportunity for abuse of the Act" (Pet. App. A-38). The court observed (*id.* at A-39):

> Denying recovery to Maze here would allow employers like Odom, who do substantial amounts of both maritime and nonmaritime work, to avoid liability under the Act to workers injured while engaged in maritime activity simply by allowing each employee to do only a limited amount of maritime work.

ARGUMENT

The court of appeals' decision is plainly correct and does not conflict with the rulings of any other circuit. Even if a "significant relationship to navigation or commerce" were an indispensable component of "maritime employment" under Section 2(3)[1]—and we do not believe it is—respondent Maze's work would unquestionably satisfy the statutory requirement. Further review by this Court is not warranted.

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[1]See *Fusco* v. *Perini North River Associates*, 622 F. 2d 1111 (2d Cir. 1980), cert. denied, Nos. 80-639 and 80-651 (Jan. 26, 1981).

Petitioners' only contention here is that respondent Maze was not a covered employee within the meaning of Section 2(3) of the Act.[2] Section 2(3) defines "employee" as

> any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder and shipbreaker * * *.

The court of appeals correctly decided that Maze was "engaged in maritime employment," because his work "directly furthered maritime commerce," because his duties on the day of his injury had actually taken him into the water, and because a significant amount of his employer's business was maritime. In light of all these circumstances, the finding of coverage is unassailable. The Benefits Review Board aptly described respondent Maze's work as "repairing and maintaining a temporary docking area in a ship loading facility" (Pet. App. A-26). This would qualify as "maritime employment" even under the most restrictive definition of the term.

Petitioners' apparent argument (Pet. 4-10) that coverage under the Act is limited to persons who handle cargo and persons who build or repair ships is inconsistent with the clear language of Section 2(3), 444 U.S. at 77 n.7, as explicated by this Court in *P.C. Pfeiffer Co.* v. *Ford*, *supra*, and in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 265 n.25 (1977). The specific occupations listed in Section 2(3) were intended only as examples of "maritime employment," not as an exhaustive catalogue of all activities that may qualify for inclusion under that general heading.

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[2]Before the Benefits Review Board and the court of appeals, petitioners also argued that respondent Maze was not injured on a covered situs under Section 3(a) of the Act, 33 U.S.C. 903(a), and that his injury did not result in permanent total disability.

Petitioners' further contention (Pet. 8-10) that respondent Maze could not have been engaged in maritime employment at the time of his injury because most of his work was performed on land is adequately answered by the court of appeals (Pet. App. A-38 to A-39). This Court refused, in both *Ford* (444 U.S. at 83) and *Caputo* (432 U.S. at 275 n.38), to endorse proposed coverage tests that would have permitted employers to limit their liability under the Act simply by adjusting the work assignments of their employees. Acceptance of petitioners' submission here would allow precisely this kind of abuse. Employers would be encouraged to spread their maritime work among as many employees as possible so that as few as possible would perform sufficient maritime work to be eligible for benefits under the Act. Congress did not intend to create any such opportunity for subverting the remedial purpose of the statute.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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